AN

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FOR THE CONSTITUTION.

THEORY AND PRACTICE

OF THE

GOVERNMENT.

BY DEMOCRATUS.

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PREFACE.

A review of political events, if heretofore a privilege, has now become a duty which is devolved upon every American citizen. The eminent Fisher Ames, who, perhaps, more than any other person, suggested the terms and conditions of the Federal Union, speaking of American affairs, says: "The events have been so interesting and so rapid, that the public mind has been confounded by the magnitude and oppressed by the variety of the reflections which result from them." This language is strictly applicable to the present condition of public affairs. He adds with equal force, that "experience which makes individuals wise, sometimes make a public mad." Whether this sentiment has found its verification in the events of the day or not, it is clearly the duty of thinking men, to examine, with candor and fairness, the policy and measures of the government. Whatever differences of opinion there may be touching the propriety of its course, there can be none about the existence of great public evils. In the discussion of the subject, all pre-conceived opinions, and all past political influences, should be discarded. This is made the more necessary, because, in my judgment, the manifold difficulties, in which we are involved, spring, in a great degree, from purely partisan sources. Ignorance, ambition and selfishness, lay at the very foundation of all our troubles. They have not only occupied the entire political field, but have so polluted the very atmosphere of government, that men of high intellect and patriotism could not be induced to breathe it. This condition of things could hardly end in anything but evil, and that we now have in its most aggravated form.

I am no partisan in the unhappy war which now devastates the country. My allegiance has been freely given, as I trust it ever will be given, to the government of the federal Constitution. It is not a blind devotion to a name, an emblem or a form. It is rendered to no administration,

but to the *principles* of the Constitution. I know no individual in connection with the subject. In forming the government of the Union, we did not recognise the existence at all, of individuals. We proscribed them in proscribing the Dynastic system of England. That was, in fact, all we effected by a separation from England.

It may be proper, in these preliminary, but necessary suggestions, to show what we condemned in the British system, and what we approved by the act of revolution.

We condemned the dynasty of George the III, and all other dynasties. The British people also condemned the Dynasty of the King who "ruled and reigned," and who assumed the right to exercise absolute powers. We condemned his settled purpose to tax the colonies without the consent of the people: We condemned his interference with our local State governments. We condemned his effort to make the military independent of, and superior to, the civil power. We condemned the suppression of our judiciary, and the erection amongst us of tribunals unknown to our laws. We condemned the unauthorized creation of offences, and the conviction and imprisonment of the people upon them, in violation of their rights as subjects of the crown. We condemned the entire scheme of despotism which asserted the principle that the government could, in any contingency or peril, transcend the powers conferred upon it by the free system of English laws.

Junius says to the King: "They (the people) consider you united to your servants against America; and know how to distinguish yourself and a venal parliament on one side, from the real sentiments of the English people on the other."

What we approved, on the other hand, was that very system of laws which the king had shamelessly violated in our persons and estates. We approved the Habeas Corpus Act. We approved the great doctrine of the inviolability of the citizens from arrest and imprisonment "without cause shown." We approved of the absolute freedom of speech and of the press, a right which every subject of the British Crown might exercise in defiance of all other than usurped and despotic power. We approved of trial by jury, and the supremacy, on all occasions, of the civil over the military power. We approved of the principles of representative, elective government, and of the subordination of all public agents to the will of the people. We

demanded integrity in the magistrate, and that he should ever hold it to be his first duty to obey the law he might be called upon to enforce.

These things we condemned and approved.

We established a new government and ordained by it that the Civil Power should be first: the military power second, and that both should be held in complete subordination to the people. The latter constitutes at once the foundation and the superstructure of our system. We have but one political estate. In England, there are two, the Dynasty and the people. We have citizens governed by laws of their own making.

In establishing the government of the Union, we neither discovered new principles, nor secured their application for the first time. We drew all our political maxims from the operations of the British system.

What we undertook to do, was, to ordain a government so as to secure at all times, and under all circumstances, the ascendency of the popular will over delegated authority. If there is anything in the recent practice of the administration which violates this fundamental principle, it is most clearly a usurpation.

There was another object to be attained in organizing the present system: the maintenance of absolute State independence and sovereignty, excepting over the particular interests delegated to the United States. It is this principle of the organic system, which has been transmitted to us, and finds expression now, in what is called State Rights.

I would not be understood as giving the least sanction to the pretended *right* of Secession, as claimed by the Southern States. It is a theory not only mischievous in itself, but absurd. The *right* to secede could not have been reserved without imparting to the Government an ephemeral character, utterly at war with the policy of the nation. All governments are supposed to be perpetual. A nation gains position and commands respect, by virtue of the evidence it is able to exhibit to the world of its ability to maintain the integrity of its organism. Perpetuity is a vital element of its character. There would be no force in a covenant reserving the right of Secession; for no member of the Union could ever avail itself of such a right except for good cause, and where the latter exists it could not be strengthened by any reservation in the bond.

THE FIRST UNION.

The commencement of the war in 1775 made it necessary, as a means of defence, to combine or unite the colonies. This union culminated the following year in the Declaration of Independence, and in 1778, in the adoption of "Articles of Confederation and perpetual Union" under the style of "the United States of America." The second article of this compact expresses the leading thought and purpose of the day:

"Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this Confederation expressly delegated to the United States."

The government, thus created, was radically deficient. It, however, possessed all the powers which the States were willing, at the time, to confer upon it. It continued three years after the close of the war, without eliciting, as far as I can find, a single proposition to enlarge its sphere, except the naked suggestion of conferring upon the Union exclusive jurisdiction over the commerce of the country. The first formal proposition of a larger grant came, in a back-handed sort of way, from New Jersey, in 1786; and, as the suggestion is an interesting historical fact, I will give it to the reader. That State appointed federal commissioners to proceed to Annapolis to "consider how far an uniform system in their commercial regulations, and *other important matters*, might be necessary to the common interest and permanent harmony of the several States." It is thus seen how gradual was the abandonment of absolute State government, and how cautious the approach to the present Constitutional system.

While a necessity existed for enlarging the powers of the government, it was the fixed purpose of the people that it should be done with as little infringement as pos-

sible, upon the rights of the States. The absolute freedom and independence of the latter, was a fundamental principle of all. Nor was this freedom, as many weak-minded persons argue, incompatible with the efficiency of the federal system. Precisely the opposite, is the judgment of reason and philosophy. The freedom and independence of the States, which are the sources of all authority, and the creators of the federal Constitution itself, are necessary conditions to a just maintenance of the integrity of that great compact. The latter is an out-birth of the former—an extension of the governments of the former. This is manifest on the slightest examination. Since the organization of civil society in this country, the States have maintained, without interruption, all the ordinary powers of political government. There has been no shadow of change in this particular. Before, during and subsequent to the Revolutionary War; and pending the government of the Confederation and of the Constitution, the States have continued to maintain absolute freedom and independence.

THE POWERS OF THE FEDERAL GOVERNMENT.

The principal powers conferred upon the United States, by the Constitution, are embraced in the 8th Section, 1st Article, as follows:

"The Congress shall have power—

"To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises, shall be uniform throughout the United States;

"To borrow money on the credit of the United States;

"To regulate commerce with foreign nations, and among the several States, and with the Indian Tribes;

"To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

"To coin money and regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

"To provide for the punishment of counterfeiting the securities and current coin of the United States;

"To establish post offices and post-roads;

"To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right of their respective writings and discoveries;

"To constitute tribunals inferior to the Supreme Court;

"To define and punish piracies committed on the high seas, and offences against the law of nations;

"To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and on water;

"To raise and support Armies; but no appropriation of money to that use shall be for a longer term than two years;

"To provide and maintain a Navy;

"To make rules for the government of the land and naval forces;

"To provide for calling forth the militia to execute the laws of the Union, to suppress insurrections and repel invasions;

"To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States; reserving to the States respectively, the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress;

"To exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings; and

"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the Government of the United States or in any department thereof."

This section embraces, as I have said, *all* the specific delegations of power to the United States. It defines the powers of Congress, and prescribes the precise limits within which they may be exercised. It constitutes, in fact, the Government, and fixes the exact sphere of its action. Nor is it possible, under an honest administration, to misapprehend or transcend its authority. The Government is an open record. Its length, breadth, and dimensions are measured with a sort of mathematical accuracy.

There are but four delegations of power to it affecting the ordinary concerns of the people in time of peace. 1. To lay and collect taxes, duties, imposts, and excises. 2. To regulate commerce with foreign nations and among the States. 3. To establish post offices and post-roads. 4. To coin money and regulate the value thereof. It is thus seen to be very limited and partial, so limited as to be utterly insufficient to be more than a Government of sovereign States. It is but a superstructure resting upon solid political foundations. This is proven by recurring to the trusts confided to it and by every historical event attending its creation. It is shown in the meager array of powers conferred, and in the studied limitations and restrictions, by which they are, at every point, surrounded. It is shown in the condition of public sentiment at the time the Constitution was adopted, and in the bundle of additional re-

strictions so soon thereafter added to it. Amongst the latter are these two striking provisions:

ART. IX. "The enumeration in the Constitution of certain *rights* shall not be *construed* to deny or disparage others *retained by the people.*"

ART. X. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are *reserved* to the States respectively or to the people."

All authority was, it is seen, delegated to Congress. It established a legislative, not an executive Government. It conferred really no power whatever upon the President. His office is called a Department, but its legitimate authority, in peace and in war, extends no farther than to enforce the judgments of the Legislature. He is made Commander-in-Chief of the Army and Navy, and of the militia, when in actual service; but this power is conferred upon him in order that he may the more effectually execute the laws of Congress. It gives him no power to originate measures, no original jurisdiction.

What, then, is the Government of the United States? Has it an existence independent of, and superior to, the States which created and uphold it? Can the stream rise higher than its fountain? [redacted]? Is it not true that the creation of the Union contemplated, as a necessary part of our political system, that the States should remain intact, and continue to be the source of all vital authority? I think so; and, I venture the prediction, that although the tendency of the day is to clothe the Union with supreme powers, to magnify its office and sanctify all its acts, good and bad, legal and illegal, the time will soon come when the States will rise, in the majesty of their power, to assert their rights, maintain their independence, and punish the whole family of federal usurpers, who have sought to degrade and ignore them. John Quincy Adams said of the Union in 1820, to Sir Stratford Canning: "The supreme unlimited power is considered as inherent in the whole body of the people, whilst its delegations are limited by the terms of the instruments sanctioned by them, under which the powers of legislation, judgment and execution, are administered." The Constitution is a bundle of grants, checks and prohibitions, so interwoven as to array before the representative, at every point, the restraints upon, and the limits to, his official authority. It is impossible to examine it without being struck with the conviction, that its

framers not only distrusted the patriotism and fidelity of those who might be intrusted with the public administration, but determined to so mark out their path, that a failure to pursue it, would, of itself, convict the delinquent of wilful infidelity to the Constitution.

The United States have express and implied power to punish crimes committed against their authority, being restricted only in the trials thereof, to "the State where the said crimes shall have been committed." That of treason, the gravest of all offences, is expressly defined, and the Government is limited to the scope of this constitutional provision, viz:

"Treason shall consist *only* in levying war against them, or in adhering to their enemies, giving them aid and comfort." And,

"Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted."

Blackstone says: "By attainder, for treason or other felony, the blood of the person attainted is so corrupted as to be rendered no longer inheritable." The Constitution modifies this rule of law, confining the forfeiture to the lifetime of the person convicted, and the trial of persons charged, to the State where the offence is committed. The reason for this seeming tenderness on the subject of treason, is found in the fact that we had but just emerged from a successful rebellion—just relieved ourselves from the responsibilities of the crime of treason in its most aggravated form. It is perfectly natural, therefore, that, in providing for its punishment, under our system, we should take away from it the severe penalties of the English law.

I submit to the reader, without comment, the foregoing provisions of the Constitution, touching the powers of the Government over alleged political offences, including the questions of forfeitures or confiscations, with the simple request that he will recur to its practice during the last year and a half, with reference to persons charged with disloyalty to the Constitution. The most charitable conclusion, in which perhaps one ought to take refuge for a little time at least, is, that the heads of the Government, in the language of Silas Wright, constitute a part of that "large proportion of our statesmen who appear never to have read the Constitution of the United States."

THE STATE GOVERNMENTS AND THEIR POWERS.

Having presented, in some detail, the powers of the federal government, by way of contrast, and for the better understanding of the distinctive features of the two systems, I shall now undertake an analysis of the State governments, embracing a short review of their principal rights and functions.

I have treated the Union as a Confederacy, and not as "a consolidated or national system," as some of its early opponents called it. Its political anatomy, presented to the Virginia Convention, by Mr. Madison, may be interesting. He says: "It is of a mixed nature—it is, in a "manner, unprecedented; we cannot find one example in "the experience of the world. It stands by itself. In some "respects it is a government of a federal nature; in others, "it is of a consolidated nature."

As a mere anatomy of the system, and very imperfect at that, this is, perhaps, technically correct. It is almost entirely federal in the election of President and Vice President. These functionaries are chosen by electoral colleges of the several States. The machinery of the elections, the representatives, and the award of the colleges, appertain exclusively to the States. Some of the States refer the question of presidential choice to their local Legislatures: and it is competent for all of them to do.

The Senate of the United States is not only federal in the choice of its members, but is peculiarly so in its very structure and functions. It is composed of two Senators from each State. These persons represent the State. New York, with its four millions of inhabitants, and Rhode Island, with considerably less than a tenth of that number, appear in the Senate upon terms of absolute political equality. That body, too, is the highest branch of the Legislature. It divides the duties and responsibilities of the Executive Office. It exercises a supervisory control

over appointments. No treaty is valid without its approval. The Senate is exclusively federal.

The House of Representatives, on the other hand, has many national features. Its members are chosen from specified districts, directly by the people. They hold their credentials from the people of their respective districts. The elections, however, are prescribed by the laws of the States; all judges and officers of elections, are State officers. The Congressional Districts are fixed by State legislation. Credentials even must receive, in many cases, the seal of the State.

Now, let us examine the great mass of powers exercised by the States. The constitution calls them: "the powers reserved to the States respectively, or to the people." By whatever name they may be known, they embrace, as we know, the entire machinery of the State governments.

They determine the relations of husband and wife, parent and child, guardian and ward; they establish the conditions of marriage and divorce; they regulate the tenures of estates and the estates of deceased persons; they decide all controversies between citizens involving rights of property, personal rights and injuries; they redress wrongs; they punish crime; they charter municipalities, institutions of charity, education, science and arts; they incorporate banking, canal, road, manufacturing and other companies; they maintain the poor; they authorize and construct great works of internal improvement; they borrow money and pledge the public faith for its payment, giving out bonds which have found credit throughout the world.

These are some of the ordinary powers exercised by the State governments: the "reserved" powers to which I have referred. Now, what are the visible features of a system of political vitality like this? They consist of an Executive, Legislature, and a Judiciary, of a complete, comprehensive scheme of government, embracing the power of taxation; the right to bear arms, and, by inexorable logic, the sovereign right to maintain its perfect integrity against all and every authority; because it is original government here, the Union being an offspring or outbirth from it, created by authority delegated to it, which is expressly defined and limited to the enumerated trusts of the Constitution, none of which interfere with the exercise, by the States, of the great mass of "reserved" powers. The latter, in plain speech, constitute the foundation

which sustains the federal superstructure. If they are weakened or broken, so must the whole edifice suffer. Nor is it possible, without serious damage, if I may strain the figure, to enlarge the superstructure, at the expense of the foundation. The harmony and perfection of the system depend upon the maintenance of the perfect integrity of the parts.

There is no other real element of consolidation in it, except what relates to foreign intercourse, commerce, customs, gold and the post-office. The States work their accustomed machinery, outside of these exceptions, in the very spirit of independence. Else what means their elaborate and almost perfect governments? Why, otherwise, do they execute nineteen-twentieths of all the functions of the civil administration? Have their magistrates no authority? Are their decisions not obligatory? Are their taxes a fraud? Do the States give us counterfeit tenures to real property? Are marriages void and children illegitimate? Is the punishment of crime mere mob violence? Are executions for capital offences, murders? Is the collection of debts a usurpation? Is the maintenance of order, disorder and anarchy? Are all these federal, not State matters? In the progress of centralization, and the expansion of the military power, are we to turn over all these "local interests" to a squad of federal post-masters, collectors, marshals, judges and attorneys? Are we so fallen in love with revolution, that we too, must put its wheels in motion? The field is broad indeed; and it is quite all occupied by the States. They authorize the doctor to prescribe; the lawyer to plead; the merchant to trade; the minister to preach; the broker to sell; the mechanic to work; the farmer to labor. The entire industrial and social systems, of the American people, are based upon State institutions and laws. Slavery and anti-slavery are two distinctive social elements, abounding in different States, and respectively sustained by opposite opinions. The Union, nevertheless, has been maintained: simply because its sphere of operations did admit of contact with the legitimate sphere of the States.

Apprenticeship in New York, and slavery in Virginia, are institutions with which the federal government have no concern. The former State has adopted, to a certain extent, the common law of England; while the latter has thought proper to rely upon its own judiciary to determine the applicability of English jurisprudence to her system of

polity. No one questions the right of the parties to pursue such course, on the subject, as their judgment should dictate.

Do not the politicians of this country understand that the federal system cannot be enlarged without putting down the State systems? That to sustain the former, by direct action of the people, is impossible in the present temper of the country? The federal government, on its present scale of operations, would not stand a day without the direct support of a powerful Army. It is an Army government. It has stricken down the judiciary of the States. It has arrested individuals, and lodged them in the forts, without permitting authorized tribunals of the people to inquire into the causes of such arrests and detentions. It has deposed magistrates. It has dismissed Senators, and members of Congress, from the legislative Halls of the Union, for no other offence, than opposing, with manly firmness, the exercise, by the government, of unauthorized powers.

These violations of the reserved rights of the States, it will be remembered, have been perpetrated in the very presence of a powerful army. Menace and wrong are stamped upon almost every arrest and imprisonment, every sacrifice of individual property, and every exercise of power by the government. A headlong tendency to overstep the bounds of constitutional law is visible in all its acts. The very safety of the nation may, perhaps, be found in the wantonness with which the rights of the people have been assailed and the personal liberty of the citizen sacrificed.

EXECUTIVE OR CONGRESSIONAL EMANCIPATION.

The President has not left us in doubt as to the source of the authority under which *he* declares emancipation in the States; "for" he says, "as Commander-in-Chief of the Army and Navy, *in time of war*, I have the right to take any measure which may best subdue the enemy." These words are sufficiently explicit upon the question of authority. The right to emancipate accrues by virtue of actual war between the United States and the Confederate States so called. By virtue of this war he has a right to proclaim emancipation. It is an Executive military right. Congress has nothing to do with the subject. It is the President, Commander-in-Chief alone, who is thus empowered. It is a war power. The federal Constitution confers authority upon Congress to declare war; but once declared, that is the end of Congressional and the beginning of Executive authority.

But the President's Proclamation is based on the assumption that the States over which it is intended to act are still members of the federal Union. This fact goes very far to annihilate, at once, the rights which he claims "in time of war." We are not at war with the seceded States, but struggling to put down rebellion therein. It is not a time of war, but a time of rebellion. The rebels are in the Union, the constitution and laws of which they have violated; and we intend to put them down and then punish them for treason to the government of the Union. If they are not in the Union, but a public enemy, what means our confiscation act, and our test-oaths, administered all over the South where we can enforce them? If they are not in the Union, what means the President's Proclamation of the 22d September, in which he proposes certain punishment to all who shall not on a certain day, "be in good faith represented in the Congress of the United States?" If they are in the Union, on what principle

does the President find the country in a state of war by which he is endowed with authority "to take any measure to subdue the enemy?"

The truth of all this is apparent on its face; the President agreed to execute the commands of the abolitionists; and he seized upon the most plausible reason at hand for doing it. I think, however, he might have done better by announcing at once, that he had determined, if he could do so, to emancipate the slaves of the Southern people, on the ground that they were in universal rebellion against the Government, and the enemies, in fact, of the Northern States. There is, after all, a great amount of authority and right in any one to punish his enemies. An enemy is a sort of outlaw, as is proven by the brutal instruments and savage butcheries of war, which are everywhere recognised as civilized weapons, and very christian homicides. That we are at war with the South, to all intents and purposes, all admit. They are our enemies, and we are theirs. We wish to damage them, as they would damage us. If the President, then, had announced a purpose to emancipate their slaves simply on the ground that they are our enemies, there would have been a sort of charm at least in the proposition. But he chose to rest his act upon his *right* as President to do it; and in that he inflicted a heavy blow, not upon the South, but upon the institutions of his own country. His emancipation paper has no other force than to discredit the integrity of the federal Government. This discredit results from an assumption of right to do an act under the Constitution, which is a palpable violation of that compact. It adds duplicity to guilt. It inaugurates a practice in the Executive Department which cannot fail, unless checked by popular remonstrance and protest, to destroy the Union. He has no rightful authority to emancipate slaves. His act is a naked usurpation. With what grace, or face, can the loyal States exact obedience to a Constitution, which they deliberately disregard or violate? Are we released from the law because others have violated it? Does it strengthen our hands, as vindicators and champions of the Constitution, to lay aside its obligations, transcend its authority, and violate its solemn covenants? Are the people of the South more guilty of disloyalty, by throwing off at once, all allegiance to the Government, than our own Chief Magistrate, who, with an army under his command, wilfully tramples under foot every restraint which the Constitution has imposed upon him?

There are legal parties to the Government of the Union —the States and the United States. The practical operation of the system has evolved what may be termed the political common law of the nation—consisting of universally recognised constructions of the powers of the federal Government. This law is the product of elaborate and profound discussion by the press, by statesmen, politicians, legislators, lawyers and judges. The establishment of a free government here was quickly followed by the establishment of a free press, which, if not always the most conservative, is the most vigilant, searching and powerful, of the institutions of modern times. It has been under the discussions and influence of this great engine of mind, that the political common law of the Union has been ordained. The powers of the President constitute a branch of this inquiry, of peculiar interest. No one has ever before conceived the notion that the President was authorized to emancipate slaves.

The President shall have power, the Constitution says, to grant reprieves and pardons; by the advice of the Senate to make Treaties; to nominate and appoint embassadors, ministers and consuls, and all other officers of the United States; to fill vacancies; and he is enjoined "to take care that the laws shall be faithfully executed."

These are all the powers conferred upon him by the Constitution, excepting the conditional veto. The right to declare war is vested in Congress, and so is the kindred right "to make rules for the government of the land and naval forces."

The subject of slavery, in its connection with the federal Government, is an interesting point of inquiry, now that the President assumes the right of emancipation. When the Union was formed, slavery existed in nearly all the States. Slaves are counted, to a certain extent, as a basis of representation in Congress. This provision is general, extending to every State of the Union. In another part of the federal compact, it is agreed that fugitive slaves shall be surrendered to their masters. These covenants fix the *status* of slavery in the Government. It is a State institution, and, as such, is placed by the Constitution itself, beyond the control of the President and of Congress. It is so defined, in express terms, viz:

"No person held to service or labor *in one State under the laws thereof, escaping into another*, shall, in consequence of any law or regulation therein, be discharged from such

service or labor, but shall be delivered up on claim of the person to whom such service or labor may be due."

This is explicit and conclusive. It prohibits the States from emancipating even fugitives coming within their limits. What the States are forbidden to do, slavery being defined as a State interest, surely the President cannot do without express authority. In the face of these provisions of the Constitution, on what possible ground is it urged, that the President or Congress, or both, may, at will, emancipate slaves in the States? No authority, to that end, is vested in those departments. They are specially endowed with power to do certain things, just as the judiciary is; but the right to emancipate slaves is not one of the grants. On the contrary, it is expressly covenanted as a fundamental principle of the Union, that *three-fifths* of all slaves held, or to be held, under State laws, shall be counted as a basis of federal representation in Congress; and the authority of the federal Government is extended to slaveholders, to reclaim their fugitive slave property, when found in another State. What would be thought of an individual who should deny the right of property in his neighbor to certain things, which, by previous agreement, he had undertaken to aid him to hold and enjoy? What would be said of the integrity and fair dealing of that neighbor, if, upon inquiry, the property in question, should be proven to have been, for a century, in the hands of its present possessor and his ancestors?

But it is a waste of ink and paper, I hear the reader say, to seriously discuss the authority of Congress, or the President, to act upon slavery in the States. The theory and practice of the Government is against it. Policy and principle alike condemn it. Honesty and fair dealing reject it. The high interests of the State, and the higher interests of humanity, repudiate it

There is, nevertheless, a party in the country who demand emancipation. That is their only object. They are indifferent to the means, or agencies, by which their cherished designs shall be accomplished. They hate the Federal Union, precisely as they cherish abolitionism. The existence of the former, in its integrity, is incompatible with the success of the latter; the triumph of the one is the downfall of the other.

So far in the history of the Union it has met but one formidable enemy. Its achievements cover a broader field, and more solid benefits to mankind, than has ever before

fallen to the lot of a nation. No human power can comprehend the magnitude of the blessings which have flown from the federal Government; and no human power, in my judgment, can measure the sacrifices of its failure. If, however, it must fall, or what amounts to something worse, be held together by the force of arms, the true friends of the Union will know that the great disaster is due alone to the abolitionists. These criminal agitators have formed an opinion concerning slavery which has utterly corrupted their allegiance to the Union—an opinion obstinate and predominant, to enforce which, they have ever shown themselves ready to sacrifice the Constitution.

MILITARY EMANCIPATION.

What powers, if any, are conferred upon Congress, or the President, by conditions of War?

It is important in this connection, to define and name the grand carnival of death now being enacted by the people of the North and of the South.

The enormity of its crimes, in my judgment, are not relieved by a single valid excuse or justification. It is purely a war of human passions, stimulated into action by gross and unpardonable ignorance, suspicion, ambition, and fanaticism. Abolitionism on the one hand, and proslaveryism on the other, have drawn a nation of upright, industrious, and virtuous people, into the very court of sin, desolation and death. If a struggle so wicked should result in degrading the national character only, it might, perhaps, be endured; but the treading out of every principle of social and political morality—the utter brutalization of the people, are to be, I fear, its only achievements.

The Government says, we are not engaged in war, but in suppressing a gigantic rebellion. It proposes, when we shall become masters of the insurgent country, to treat the people thereof as rebels. It maintains that they do not constitute a *de facto* government, which is the lowest estate capable of making war—that the government of the Union rightfully extends over every inch of its original territory. The utter obliteration of the rebels, on paper, is thus quite complete and satisfactory. As a matter of legal right too, this assumption is altogether correct. The Government has an undoubted option to conquer the rebellion, or acknowledge and recognise the State for which it is fighting. We are not engaged in war; it is a purely domestic quarrel, an affair of our own. Whatever powers the President and Congress possess, are peace powers, constitutional powers, delegated powers. But it is said, the President, in the event of war, as Commander-in-

Chief of the Army and Navy, is endowed with absolute authority, "to take any measure which may best subdue the enemy;" and that, as the present struggle involves all the incidents, and employs all the agencies of war, that his powers are now plenary. This assumption can hardly be said to raise a legal question; it is, by its very statement, a military edict. Right is made to give way to might. There is not a word in the Constitution to authorize the President to do what he proposes as "a measure to subdue the enemy." In announcing such a principle, he evidently saw more of the Army than of the Constitution, of force than of right. With the Army to enforce his decrees, he has power to do almost anything. He may dissolve marriage contracts; release criminals from prison and put in their place sheriffs and magistrates; he may declare offences unknown to the law; he may emancipate slaves: all these things he may, unquestionably, do by virtue of the fact that he controls the Army. With large means and small scruples, I do not perceive where his authority ends.

But no one will look to the Constitution for power thus to act. That compact is not, however, altogether silent on the subject. It defines his authority with perfect accuracy. It says, he shall execute the laws, not make them.

Congress is empowered, as we have seen, "to declare war."

It is hardly necessary, to say, that the exercise of this authority, though of vast importance to the people, opens to the President no new field of operations. He is simply intrusted with the duty of enforcing, not making the laws; even the rules which govern the land and naval forces it is the duty of Congress "to make." These rules do not relate to revenue, to commerce, to the public lands, to civil government, in any sense, but to the discipline and management of the Army; yet, the President is not permitted to exercise even this power.

We are compelled, then, to look outside of the Constitution for authority to emancipate slaves. It is found in the fact—so we are gravely told—that emancipation is necessary to weaken, paralyze and destroy "the public enemy." If we are at war with an independent State, there can be no doubt of the right of the Government to conquer a peace, by every means recognized amongst civilized nations. That is a plain proposition. War does not relieve

us of responsibility to laws; it simply removes, for the time, one code and substitutes another—the laws of the State, to a certain extent, give place to the laws of nations. Under these restrictions, when the question is, how far we may damage the public enemy, we need not look to the Constitution for authority to do this or that, but to the law of nations and the dictates of a common humanity, to see how far we may go, or rather what positive restraints are imposed upon us as a belligerent.

In seeking to suppress the rebellion, for instance, we have been compelled, in some respects, to conform to the laws of war, though we have persistently maintained, all the while, that the struggle is purely domestic, with which other nations have no right to interfere. We have made these concessions on the score of humanity. Nor have they been made, I would believe, in the interest alone of the adherents to the federal Government. The laws of humanity have fairly overridden the laws of the State. We cannot punish a rebel, even on the clearest evidence of his guilt. We cannot hold him in custody. We are compelled, by great public considerations, not only to release him, but to send him back to the new State to which he professes to owe allegiance. I speak of these manifest conditions of the struggle, in order to show, how completely the necessities of the hour control the action of the Government, even in opposition to the local law.

Is it now proposed to abandon this humane policy and adopt a rule of warfare which shall end in an "undistinguished destruction of all ages, sexes, and conditions." Is such a measure compatible with the grand purposes of the nation? Let us see. The South have four millions of slaves. We propose to emancipate them, not by legislation, not in time of peace, not even in the spirit of philanthropy, but in time of war and by an act of war. It is not, then, freedom to the blacks, that we seek, but destruction to the whites. We propose emancipation, because it is believed, that one of its immediate fruits will be, servile insurrection. The President, by his Proclamation, delicately intimates this by declaring that the military power "will do no act or acts, to suppress such persons, (slaves) or any of them, in any efforts they may make for their actual freedom." And then who are to be the victims? Not the men in arms, the actual offenders, for they can defend themselves. Who then? The old, the lame, the halt, the blind, the sick, the defenceless—the women and

children of the insurgent States! Is it urged that the principles of civilized warfare can justify a measure of such wanton barbarity? Is it maintained that emancipation, under the circumstances, can bear any other fruit?

Of all the rules that govern mankind, those which relate to war, are the least definite and the most liable to violation. There are, nevertheless, certain fundamental principles of justice and humanity, which can not be set aside. It has been the constant effort of modern civilization to enlarge the sphere of these principles—to modify the evils of war; to remove, especially as far as possible, its burdens and sacrifices from the masses of the people. It has been thought sufficient to satisfy the ends of justice, that Armies and Navies should settle questions of international quarrel and command terms of adjustment. These efforts betoken an advance of civilization. They are taken in the midst of peace, when the mind can calmly review the miseries of war, and is impelled, as it were, to surround it, when it comes, with such wholesome limitations and restraints, as will shield from harm, if possible, those who contribute least to inaugurate it, and sacrifice most to effect its termination. Granting that we are at war with the most detestable and hated nation on the globe; that we have been forced into it; that we have been barbarously treated during its existence; can we afford, nevertheless, to depart from that humane policy, and those just maxims of national and international law, the violation of which constitute, after all, the chief ground of complaint against our public enemy? The North was clearly in the right, at the commencement of this quarrel, and the South as clearly in the wrong; I would not, on any account, see the attitude of the parties reversed. But emancipation by the former, by act of war, will do this with a vengeance!

But is it clear that military emancipation is possible? Have we gained such control over the insurgent States, as to enable us to vitalize the measures of the Government therein? If not, we shall acquire credit, throughout the world, for seeking to enforce a brutal and bloody edict upon the people of the South; and they will win the crown of martyrdom without suffering its sacrifices. Its failure will be a two-edged sword. It will build up, strengthen and fortify the South. It will weaken, demoralize and divide the North. In the judgment of tens of thousands of loyal men, the proposition stands now as a gigantic assault upon the Union spirit of the nation—an attempt

to degrade Unionism, by attributing to it the most shocking barbarities committed in utter contempt and violation of the Constitution of the United States. It cannot even be pleaded, that military emancipation proposes, as a first object, freedom to the blacks; it is destruction to the whites. It is not a union—re-construction—a constitutional measure; but a disunion, disintegration scheme—a sort of infernal massacre—a grand slaughter of women and children—a peerless national homicide! It is to be enforced, too, as a measure of blood—the consummation of a long cherished purpose, by men, who have ever regarded the maintenance of the Union as incompatible with the ultimate triumph of their scheme.

But let us suppose all objections on the score of humanity and of national and international law, to be removed—that emancipation is a legitimate act of war, on whom is the penalty to fall? Who are to bear the forfeiture?

We say the rebel States are in the Union still. This pre-supposes the existence of loyal men—loyal slave-holders of those States. Are they excepted by the terms of the Proclamation? No. Grant that they are in a powerless minority; are they to be punished for not being in the majority? They are proscribed by the Confederates; is it just that they should be sacrificed by the federal Government, whose authority they have maintained, and in whose cause they have been stricken down at home? Is their property to be taken from them because their neighbors have proven disloyal to the Union? Who gave the President, or Congress, the right to take it?

But it is answered, the people of the State—the majority of the State, are in rebellion against the Union. Be it so. Then put down the rebellion and punish the rebels to the extent of your constitutional authority. Do not convict, at wholesale, by executive proclamation. Do not sacrifice alike the guilty and the innocent. Employ your tribunals of justice. It is their office to punish rebels. Ours is not a military government—unless, indeed, we have obliterated all distinction between right and power. If, however, the latter is the supreme law—if it has ignored the Constitution—if it first distrusted, and then blotted out, the judiciary—if we are, where we seem to be, outside the limits of constitutional government, and within the very grasp of ~~abolitionism~~ Abolitionism, let us, at least, comprehend our own great sacrifices, while we deplore and lament the errors and sins of the South. We have then lost the liberty and

independence of the people; have the South lost more? Well did Patrick Henry exclaim in the Virginia Convention: "Liberty, the greatest of all earthly blessings, give us that precious jewel, and you may take everything else!"

We have undertaken to force the South back to her allegiance. In doing this, is there not danger, that, by our unconstitutional acts, we shall destroy the very principle upon which that allegiance can, by right, be exacted? Is there not danger that the system we undertook to save may be swept away by the storm of human passions which the effort has engendered—that the instruments we have employed may grow into such power as to overshadow and overwhelm the constitutional government which called them into being? Where now are the tribunals of justice whose office is to try and determine the guilt or innocence of parties charged with treason against the Union? Have we, any more, an independent judiciary—the very fountain of justice, in a free government—the trusted exponent of its laws and the shield of the citizen against the encroachments of military power? It is the judiciary which is the peculiar representative and organ of the civil administration. We charged the government of England with having made "the military independent of, and superior to, the civil power;" an offence in that day of the very first magnitude.

The President is our civil Executive Magistrate, intrusted at the same time with the command-in-chief of the Army and Navy. He is supposed to be a civilian, and to lean to the side of the civil authorities. This, at least, is the theory of the system. Whether the framers of the government adopted the best course or not, to secure the ascendency of the civil over the military power, is another question. It is said, "a little knowledge is a dangerous thing." It is apparent, I think, that our present Executive, in his conduct of the war, has not altogether disproved the truth of this maxim. We may consider the country fortunate if the evil extends no farther than to the mere mismanagement of our military campaigns. There is a dangerous allurement in wielding a great military power—a constant tendency to strengthen itself by its exercise. In such cases, too, the civil departments become, by a sort of comparison, feeble and inefficient, while the military head not only engrosses all attention, but almost imperceptibly dictates all measures. Armies

have never been noted for loving constitutional governments, any more than constitutional governments have been noted for loving armies. The history of the world shows most clearly, that there is a well defined antagonism between these powers. General orders and proclamations constitute a species of short hand legislation. They make, at least, quick work, which is always sure to command the approval of the enthusiastic and the thoughtless. They reduce the machinery of government to a very narrow compass and find it necessary to confine the discussion of measures to an equally circumscribed limit.

Are these reflections unjust, in view of the events of the last year and a half? Is it said that the Army is the agent of the people, doing their bidding and executing their will? Then, I ask, by what authority, under what law? Has it been by the chart, and on a lawful voyage, that the ship has been navigated? Are we still under the constitution of 1789, obeying its commands, heeding its limitations, guided by its spirit and protected by its solemn covenants?

THE MORAL ASPECTS OF EMANCIPATION.

The legal right, in this country, to emancipate slaves appertains exclusively to the States. The powers of the federal Government, over the subject, were wholly exhausted by the Act of April last, by which slavery in the District of Columbia was abolished.

It has been maintained lately, by a few misguided men, that emancipation may be effected by what is called the War-power; but, in truth, there is no such agency under our system, if we are to understand by it, that by virtue of war, the President is empowered to do what he has no right to do within the line of his delegated constitutional powers. His office is purely representative. His duties are all defined and his action restricted to exact limits. He is called upon to enforce *existing* laws. He has no creative political power whatever. He can make no law, civil or military. He is a magistrate to enforce, not a legislator to enact laws. The State systems, throughout the entire scope of their authority, are as absolutely beyond his jurisdiction as the British government; and in one sense, still farther removed, because the very office he holds was created and is maintained by them. His emancipation proclamation, in this view, is absolutely void; and I think it fortunate, for the two races in this country, that it is so.

The objections, which present themselves to me, to the exercise of unconstitutional powers, by the President, to free the slaves of the States, as serious as such a wound may be to our institutions, sink into positive insignificance, when thrown into the balance against the mass of superior objections which crowd upon my mind, to *independent emancipation, on any terms*. The moral evils of such a measure, in other words, are infinitely greater than any political evils that can arise from the exercise of unauthorized powers by the President.

The question is not alone whether slavery is right or wrong; whether the blacks are, or not, entitled to their freedom. There is not an abstract feature in the whole problem. At every point of view the interests of *both* races are involved. I think it would go far to sacrifice

both, if enforced. If it would sacrifice either, it is perfectly clear that there is no moral right anywhere, not even in the States, where all power over the subject exists, to enforce it.

No scheme, involving emancipation, can, for a moment be entertained, which does not propose, as a cardinal principle, the completest preservation of the white race. They must be protected; because they have won, by their industry, civilization and christianity, the right of protection; they have won it by that order of nobility which God alone confers—that order which gives the superior dominion over the inferior—which is stamped upon the very forehead of nature itself, and is at once irrepealable and indestructible.

We meet, in this question, four millions of people, of an inferior race, who are held as slaves by something more than that number, of a superior order. This statement it quite enough to establish the justice of the designation I have given the two parties.

The proposition is not alone, in point of fact, to emancipate the subject party, but to make them co-equal inhabitants with their present masters. Now, what I have to say is, that emancipation, on this basis, involves the inevitable sequence of the destruction of the blacks. It assures, also, in my judgment, the demoralization of the whites.

Emancipation and colonization, as twin measures, enforced by competent authority, in time of peace, and in the spirit of genuine philanthropy, offer the only possible means by which slavery can be abolished with safety to the two interests. That they can not exist together as co-equal inhabitants, is proven by every lesson of history and every instinct and reason of humanity. Our own career as a nation affords us the most conclusive testimony upon this point.

We originally encountered the Indian Tribes of America, embracing a population of more than three millions of persons. We met them, as far as laws are concerned, upon terms of perfect equality. We made treaties with them, purchased and paid for their lands; we recognized their nationalities. We used every means to civilize and win them to habits of industry. We sent christian missionaries to them to inculcate the doctrines of peace, sobriety and good neighborhood. In all our intercourse we have sought to elevate them as a people, and to give them rank amongst the nations. We had inherited, too, a sort of reverence and respect for them, which, in spite of vex-

atious wars, pervaded all society and largely controlled our legislative action in their behalf.

Beneath all this "labor of love" there has been going on an "irrepressible conflict" between the two opposing forces—a pervading antagonism and clashing of interests and natures, which no effort could control and no ingenuity avoid.

And what has been the result? Have the two parties shown equal ability to cope with each other as contestants for empire and dominion? Have their wasting wars left them where they found them? Has it been shown in the practical life of the two races—and this is the great question after all—that the mere fact that they were co-equals has served, in any manner, to maintain the integrity and power of the inferior party?

The answer to these questions is found in the record, that the Indians have been reduced in numbers, to three hundred and fifty thousand, while the whites have increased, from a mere handful, to twenty-five millions. The former have been driven from the seaboard into the very center of the continent, where they now constitute a mere decaying remnant of humanity.

In order to show how supreme and inexorable is the law, which governs the contact of two unequal races, made co-equal inhabitants of the same country, I shall now refer to the policy and practice of the Government towards the tribes, in reference to what has been called their "permanent homes."

Their nationalities had been uniformly acknowledged. They have been required, nevertheless, to leave their territories east of the Mississippi and move to the country west of that great river, which had been set apart, by treaty stipulations, for their permanent occupation. They complained of this, and with a sort of prophetic vision foretold a near future resolution of the Government to eject them again from their homes and firesides.

They were answered by reading to them the covenants of treaties—which they were made to understand ranked highest amongst our laws—by which they were guaranteed the permanent occupation of the country west of the Mississippi. There is no doubt of the good intentions of the Government in all this. The theory was quite unobjectionable. The very statement of the case is conclusive.

The great interior, west of the Mississippi, was exactly suited to their wants, and to allay their fears, on the score of future eruptions, it was only necessary to show how

impossible it was for the whites, ever to occupy such distant and inaccessible regions.

I need hardly add that the Government has already broken every one of these solemn covenants, nor that the Indians have been ejected again and again from their new homes and reduced to a mere fugitive race. Meanwhile they have had all our sympathies and the best laws we could make in their behalf; *but they have ever had against them, the laws which govern the contact of two unequal races; and it has been the operation of the latter that has destroyed them.* They had the best field and all the rights of prior occupancy of the country. They were destroyed not on account of the hostility of the whites, but simply because they were an inferior race.

Right on the opposite page, as it were, is written the history of another inferior race, which has been held by individuals as property. The latter have been cared for, protected, improved in capacity; constantly increasing in numbers; healthy, thrifty, industrious and happy.

The antagonism between the negro and the white man is complete at every point; the blacks being purely a servile people, who, up to this time, have never succeeded in any other capacity. They have, it would seem, just intelligence enough to make them useful when held in bondage, and not enough to assure their stability and happiness as an independent people.

The emancipation of such a race would, in my judgment, be an act of monstrous inhumanity, even though the whites should retire from the country now occupied by both parties. The tide of invasion, of which we have seen so much in reference to the Indians, would at once set in upon them and sweep on to their utter extinction.

If there is any ground for this conclusion, what is to be thought of emancipation, while the whites remain masters of the country? Will the latter submit to be governed by the former? Somebody must have dominion; it is hardly possible that any one believes that the two parties can work harmoniously together.

Then, what is emancipation but a short process through which to effect the annihilation of the blacks? The legal right of the States to abolish slavery is conceded; the moral right of the States to do so, unless accompanied by colonization, I deny. Emancipation and colonization, the two schemes reduced to one—become a measure of humanity worthy of the support of philanthropists, statesmen and philosophers.

THE HABEAS CORPUS—ITS ILLEGAL SUSPENSION.

Before entering upon the discussion of the recent suspension, by the President, of the writ of Habeas Corpus, I think it proper to say a few words about the origin of this most important of all the principles of Constitutional Government. The direct office of the writ is to recover the freedom of a citizen, wrongfully taken away. The agency employed is the judicial authority of the State. Upon the faithful exercise of this duty, depends in a great degree, the liberty of every person in the commonwealth. The English judiciary has gained a wide and deservedly high reputation, more perhaps, on account of its rigid enforcement of this law against the acts of the crown, than from all other causes. The importance of the matter is little understood in this country; because, until recently, we have witnessed no direct interference with the liberty of the citizen by the Government; and on no occasion has the privilege of the writ been suspended, until now.

For a long period there prevailed in England a bitter controversy between the people and the king, the latter asserting the right, as an independent prerogative of the crown, to arrest and imprison his subjects at will. The immediate parties to this struggle, before the Great Charter was wrested from King John, were the Barons on the one hand, and the King on the other. It was only through subsequent events that the benefits of the compact were realized by the people. The personal liberty of the subject had been asserted by the common law, from its earliest ages; but it had also been continually assailed by the crown. At length it was declared in Magna Charta: "that no man shall be taken or imprisoned, but by the lawful judgment of his peers, or by the law of the land." It is manifest that the assertion of this principle did nothing more than enact the common law. It raised up before the crown, the great fact that the freemen of England

should be governed by laws and not by the arbitrary will of an executive magistrate. It was the maintenance of this principle that gave the great charter its name. That was the grand object of the compact. As usual in the progress of despotic power, the charter was broken no sooner than it was made; and although again and again confirmed, it was as often practically violated, by withholding its benefits, through the influence of the crown. The fires of liberty though thus partially smothered, were not extinguished. The enforcement of the law took from the King the principal lever by which he could reach and control his subjects. This he resolutely determined should not be. If the law itself must remain upon the books, the next step was to control the judges. Finding this more or less successful, in order to circumvent the king it was declared, in 1628, "that no freeman shall be imprisoned or detained without *cause shown*, to which he may make answer according to law."

The object of this enactment is apparent on its face; it was to prohibit the arrest and imprisonment of persons without exhibiting the ground thereof. It announced a fundamental principle of the British government; that arrests should be made only on open charges. This was simply a restriction upon the authorities. It went to the jurisdiction. It must be shown affirmatively how, and in what particular, the accused had violated the law. But even this explicit enactment did not secure immunity to the people from illegal imprisonment. At length, in 1679, Lord Shaftsbury secured the passage of that wonderfully ingenious law, which we understand as the Habeas Corpus act. It has been copied in this country, almost word for word, never losing its popular features, but often enlarging them.

The federal Constitution by fair inference, embodies the act in one of its provisions, and thus makes it a part of the organic law of the nation. It says: "The privilege of the writ of Habeas Corpus shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it."

No one, who will look into the history of the act, will for a moment, admit the right of the President to suspend the privilege of its writ. Such an admission would defeat at once, the very ends of its enactment. It was wrested from the crown, in order to prevent the unjust exercise of power, directly upon the people. It substituted the agency

of the judiciary in the punishment of crime, for that of the state and war departments, whose acts were arbitrary, oppressive and illegal. It denied to the latter the very privilege of arrest, except on the condition, that the grounds thereof should be distinctly stated; extending to the accused, even then, the right of appeal to the judiciary to inquire into the legality of the whole proceeding. What is meant by the privilege of the writ is this right of appeal. To give the President authority to suspend it, would remove at once, every check which the great act imposes upon the exercise of Executive authority.

The power of Congress over the subject is a very different matter. Whatever authority exists in the premises, is unquestionably vested in Congress. "The privilege of the writ," the Constitution says, may be suspended in certain cases; that is, the office of the judiciary may be suspended. The Habeas Corpus act declares certain principles. It announces, for instance, as a fundamental rule, that no citizen shall be arrested and imprisoned, except on charges preferred in open court. The suspension of the privilege of the writ does not suspend the operation of this rule. Arrests made in violation of it, although the writ may have been suspended, ought to subject the persons making them, to punishment. This is a rule, too, of universal application. It is directly endorsed in the 5th Article of the Amendments to the Constitution, where it is declared, that no person shall "be deprived of life, liberty or property, without due *process of law*." By the 4th Article of the Amendments, "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures" is guaranteed; and "no warrant shall issue but upon probable cause, supported by oath or affirmation." The 6th Article of the Amendments, declares that, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the *State* and *District*," and be "informed of the nature and cause of the accusation."

These different Constitutional provisions constitute, in fact, the principles of the Habeas Corpus act. The latter can no more be suspended by the President or Congress, than the former. Both are perpetually binding upon the Government, never to be disregarded. What is the difference between the declaration in the Habeas Corpus act, that "no freeman shall be imprisoned or detained *without cause shown*," and that of the Constitution, which says,

"no person shall be deprived of life, liberty or property, *without due process of law?*" The latter enlarges the sphere of popular rights by imposing additional restrictions upon the authorities. The suspension of the privilege of the Writ, in the absence of the clauses quoted, from the 4th and 6th Articles of the Constitution, might seriously affect the liberty of the citizen; but if no warrant is issued, and no arrests made, except upon probable cause, supported by affidavit; and in all criminal prosecutions, the accused may have a speedy and public trial by jury, the power of the Government, for evil, must remain practically defeated. It is the violation of all these declarations of the organic law and of the provisions of the Habeas Corpus act; the arrest of persons, all over the country, without "due process of law," without "cause shown;" the imprisonment of persons who are denied a "speedy and public trial by jury;" unreasonable searches and seizures; which are the source of anxious and well grounded alarm. The suspension of the privilege of the Writ, in point of fact, has been preceded and followed, by the practical annulment of every guarantee of personal rights contained in the Constitution and the Habeas Corpus Act. The right of the courts to interfere has not only been denied, but the law itself set aside.

I now propose to examine the question of the right to suspend the Writ. Under the clause of the Constitution referred to, two conditions are required in order to give jurisdiction:—1. That there shall be "rebellion" or "invasion." 2. The "public safety" must "require it." There can be no dispute about the meaning of these conditions. There must be rebellion or invasion, and necessity for suspending the Writ. Does rebellion in Michigan authorize the supension in thirty-two other loyal States? What was the sense of adding the words "when the public safety may require it" if rebellion itself authorizes the suspension of the privilege of the Writ?

We must bear in mind, in discussing this question, that the Union is a confederated, and not a consolidated government. The States remain as independent political communities. These communities have a complete judiciary. Something is due to their dignity; something to their fidelity to the Union; something to their independence as sovereign States, and something to the liberty of their people. Was it the intention of the framers of the Constitution, in case of rebellion in Virginia, to hamper the

people of New York? Was it thought that such an event would "require" the suspension of the privilege of the Writ of Habeas Corpus in the latter State? Did the disloyalty of one State require its suspension in all the others? Was there no principle embodied in the provision? Was it purely arbitrary? Was it incorporated into the organic law for form sake only? If not, then, on what ground, and for what reason, should the Writ be suspended?

I can readily imagine a case of formidable rebellion in a State which would "require" the exercise of this power, with respect to such State. So of "invasion." The preservation of law, menaced by either of these conditions, might require the absorption of the powers of government by the military head. Precisely this condition of things exists now. The suspension of the privileges of the Writ in Virginia, and other Southern States, is a duty, because the judicial authority of those States, as well as the Federal authority, has been turned against the Union. There is no power there to enforce the law; the public safety then clearly requires the suspension of the civil, and the erection of the military authority, *that the law may be enforced.* No such difficulty exists in New York; the suspension of the privilege of the Writ is not required there, and hence Congress, in my judgment, has no right to suspend it there.

That the right of suspension is special, and not general, is proven by the fact that rebellion in this country, by a kind of necessity, must result from State action. A lesser rebellion is not worthy of notice. When resistance to the Constitution and Laws of the Union assumes the organic form of State action, it carries with it, not only the judicial power of the State, but also of the General Government. Under such circumstances, in order that acting judicial functionaries may not have the apparent sanction of the United States to enable them the better to play into the hands of the insurgents, the suspension of the privilege of the Writ is authorized. It cannot be said, in answer to this view of the subject, that it would be a better course to remove at once all Federal officers; for, in the first place, it would require a long time to test the fidelity of marshals and attorneys, and a much longer time to go through with impeachments, by which alone the judicial offices can be vacated.

Rebellion existed a few years ago in Utah; did that authorize the suspension of the Writ in all the States?

In the present case, is the necessity for suspending judicial functions, in the loyal States, proven by the fact that those States have contributed a million of men and a thousand millions of dollars, to put down rebellion elsewhere?

But suppose it is admitted, for the sake of argument, that the President had a right to suspend the privilege of the Writ, what are we to think of the policy of the measure in its application to the loyal States? Was it well timed, judicious and respectful? Was it in harmony with the support they had yielded the Government? Had they withheld their men and their money? Were they unable to maintain order and enforce the laws? Was their integrity suspected, their fidelity questioned, or their loyalty doubted? Let us see.

Whether wisely or not, certainly in the very spirit of patriotism, the loyal States, a year and a half ago, took up the infant Mr. Lincoln, in his very political swaddling-clothes, and surrounded him with an army of volunteer defenders, such as the world had never before seen, and such, I apprehend, as the world will never again see. He was poor and helpless. He had neither men, money, nor material. He was as weak in council as he was abject and dependent. Having done for him every thing that could dignify his name, elevate his character, and build up his credit, they retired to pursue the peaceful avocations of life, leaving it to him to put down the rebellion and punish the rebels. It is not the business of this paper to show how signally he failed at every point, nor how liberal, indulgent, and confiding, meanwhile, have been the people of the loyal States. That he failed in every thing, except in the extravagance of his life and the grandeur of his pretensions; that he failed to execute the laws, because he was the first to violate them; that he failed to command the confidence of the people, because he would keep faith with nobody but the Abolitionists; that he succeeded only in transcending his constitutional authority; that he succeeded in violating all his promises and pledges; that he succeeded in sacrificing the confidence of the country, and by his tergiversations, shifts, and boggles, rendered abortive every effort made to strengthen his Government, are, unfortunately, historical facts.

Was it wise in Mr. Lincoln, under such circumstances, to travel out of his sphere, to insult and hamper the very States which had defended and sustained him? Was it just to question their fidelity to the Constitution, in the

face of his solemn assurance to the whole world, through his first Minister, on the 22d of April, 1861, that: "The condition of slavery in the several States will remain just the same, whether it [the rebellion] succeeds or fails. The rights of the States, and the condition of every human being in them, will remain subject to exactly the same laws and forms of administration, whether the revolution shall succeed, or whether it shall fail. Their constitutions and laws, customs, habits, and institutions, in either case, will remain the same;" and his recent emancipation proclamation, by which he proposes, at a single blow, to annul those "constitutions and laws," to obliterate those "customs, habits, and institutions," and destroy the lives and property of the people?

The great question presented is one involving the loyalty of the citizen, and the officer, to the Constitution of the United States. Arrests have been made, all over the country, on the alleged ground of disloyalty. The President, meanwhile, sets an example of infidelity and treachery to that great compact, so monstrous and palpable, that the most earnest sympathizer with rebellion recoils with alarm and horror. He not only forfeits his most solemn pledges, made to the whole country and the world, but he assumes to exercise powers, in direct violation of that Constitution which he had sworn to protect and defend. He has exacted allegiance, not to the Union, but to his administration. He has, by example and instruction, sought to release the Army from obligations to the Constitution, and force it to execute his unauthorized and revolutionary behests. He has endeavored to intimidate the people by arrests and imprisonments, against remonstrance to his course; he has put a censor over the press; he has silenced the judiciary; he has expelled legislators from their seats; he has deposed magistrates; he has inaugurated and put in operation a grand central despotism, whose law is supreme, and to whose decisions he exacts absolute submission.

Another practice, upon a kindred subject—that of prescribing test oaths and oaths of allegiance—is a most repulsive feature of the administration. It sets up a claim to imperial control over the people. It destroys, at a blow, the representative character of the Government. It decrees the existence of a full grown dynasty more anxious to exhibit its power than to execute justice. It proclaims a standard of allegiance to the American people, plainly implying that their patriotism is deficient, their institutions

defective, and their loyalty doubtful. It is not enough that the citizen shall obey the laws; he must accuse himself of infidelity, by swearing that he will not prove a traitor to his honor and to his country; and he must, in addition to this act of self-abasement, pledge his estate to the Government. This is what the inventive genius of a democratic administration have devised as a bond of union between the citizen and the Government.

The practice of nations, prompted by wise and humane reasons, has uniformly permitted a citizen to give in his allegiance to any *de facto* government, which, for the time being, exercises control over the State or district where he resides. The reason for this rule must be obvious to the meanest intellect. Non-combatants are never regarded or treated as enemies, nor are they held responsible for acts of government. While the question of dominion is being tried by hostile armies, they are not only held as innocent parties, but efforts are made to win them to the cause of the dominant force. Hence, upon the high seas, in neutral ships, none but military and naval officers are treated as contraband of war.

Non-combatants stand, in many respects, in the position of neutrals. They have a right to conciliate the dominant military power, by rendering to it, for the day, their allegiance, without giving just ground of offence to the State of which they are citizens. They are not parties to the war until they enlist or are forced into the service of one of the belligerents, in which case they become subject to the laws of war, or if it be a rebellion, to the laws of the State against which the act of treason is committed.

The administration have not thought proper to adopt these just principles, but, impressed apparently with the idea that allegiance is altogether a matter of force, they have exerted the power they possess to compel the people not only of the rebel, but of the loyal States, to swear that they will be faithful to the Government of the Union. This practice, if enforced by both Governments over districts occupied alternately by each, cannot fail to lower the standard of morality, by making such solemn appeals to Almighty God little better than a shallow trick or deception.

The practical operation of such a system, too, is most offensive. While the soldier, taken in arms against his Government, cannot be punished, or his allegiance in any manner exacted, the non-combatant is held to the strictest

obedience to the orders of all local military commanders. There is a sort of blustering pretension in the working of the rule, in this way, which is most repulsive to a generous nature. It is enforced with remorseless severity upon the defenceless, while it is relaxed or wholly abandoned in the presence of actual offenders with arms in their hands. The humanity of the Government is quite all dispensed upom the army of the enemy, while non-combatants, on the bare suspicion of entertaining unfriendly sentiments towards the Administration, are treated with all the rigors of an inflamed conqueror. The rule seems to have been settled upon the principle of doing the greatest amount of harm to those who have no means of defence, and the smallest chance to avenge the wrong. It never seems to have occurred to the administration that allegiance is a voluntary principle in this country; that oaths can have no other effect upon individuals than to degrade the party which exacts them, and, perhaps, demoralize those who take them.

Although we have a full record of unlawful arrests and imprisonments, the presumption is, that they are the work of minor officers, who are more zealous in the cause of the Union, than wise in comprehending its Constitution and laws. It is not, for a moment, to be supposed, that the President of the United States will entertain mere petty resentments, or seek, without just cause and authority, to interfere with the liberty of the citizen. His position is that of a father at the head of the household; and his policy is one of conciliation towards, and care for, the welfare and happiness of all the inmates. They enjoy the honors and advantages of a common paternity, and are entitled to the benefits of a common inheritance. If they have offended against the just authority of the house, it is the duty of the President to expostulate with them, and, after a full review of alleged grievances, to correct what has been wrong in the past; and then to enforce, with resolute determination, what is right in the future. Violent measures, in a popular government, should never be adopted until every other means of accommodation have failed. Arbitrary imprisonments, test oaths, and oaths of allegiance, imposed upon those who cannot resist them, or forced allegiance in any form, only widen the gulf between the contestants, and embitter the recollection of previous quarrels. The President of the United States is a high officer of State. However much others may exhibit a want

of charity, forbearance, and practical sense, in the present crisis, it would seem impossible that he should either become a partisan, or lend them his countenance or sympathy. If he would win more than the applause of passion and the endorsement of fanaticism, his measures must bear the stamp of conciliation, justice, and humanity. He must represent the people. What is meant by this is, that he shall faithfully execute every trust vested in him by the Constitution, and resolutely refuse to transcend the authority of that compact. If, in the measures to which I have referred, he has assumed to exercise powers not confided to him, he has only to retrace his steps. The judgment of the nation is full of charity and magnanimity. It will punish those who persist in error and wrong, no matter on which side of the lines they may be. It has sagacity enough to see what is right, and firmness enough to enforce it.

WILL THE PRESIDENT RECEDE?

By the theory of the Government all power is inherent in the people. This does not, however, contemplate the immediate action of the people upon public measures. Such action, by virtue of the powers delegated, is confined to representatives or agents, including the President. There is, then, under this fair statement of the case, at least a supposed connection and concurrence between the agent and his principal, and a disposition on the part of the former justly to represent the opinions and wishes of the latter. That the one or the other can be quite perfect, is not proven by experience; and hence a large measure of charity is required by either party. The administration of Mr. Lincoln has undeniably encountered the most serious and alarming events. They have, too, fallen suddenly upon the country. In adopting measures to meet them, the wonder, perhaps, is, that his policy has not been more universally condemned. As the Executive Magistrate, he has enjoyed largely the confidence of the country. He has been credited with good intentions, and with humane, kindly instincts. It has been almost universally believed that he sincerely desired to represent the opinions and wishes of the people. This conviction has added largely to his popularity, and to the strength of his administration. The public have been convinced, that, without dishonor to his firmness, he would be ready, at any moment, to retract an opinion too hastily adopted, when he could be made to feel that it was opposed and rejected by his constituents. The moral firmness required to do this is equally rare and attractive in a high officer of state. The tendencies of power are, unquestionably, very much against it. They lead the agent, invested with absolute trusts, not only to a reliance upon himself, but imperceptibly, as it were, to regard the *cause as his own*. The very habit of independent action, in this way, unless controlled by high intellect and a clear perception of the nature of

the office administered, tends to confirm the incumbent in the exercise of absolute powers.

From this position, the road is a short one to that political dispensary which gives all the good reasons why the public interests demand and justify the course pursued. In the present instance, the magnitude of the rebellion, and the labors of war, offensive and defensive, call, it is said, for the exercise of any and all power at the mere option of the President. It is argued that constitutional restraints and prohibitions, in such a crisis, are so many brakes upon the car of state, the control of which are in the hands of the enemy. This may seem plausible, and it may be, to some extent, truthful; but it is nevertheless revolutionary and indefensible. The President's office is confined to the enforcement of the laws. The principles of the Government which he administers, its practice and its welfare, all combine to instruct him to limit the range of his duties to the *executive* office, to which he was legally elected; and they are equally explicit in telling him that he is responsible to the people—that he is, in fact, administering *their*, not *his*, Government.

There are always seasons appropriated by nature for calm, deliberate reflection. The wildest passions subside for this purpose; the keenest anger, the most unbridled ambition, alike claim the benefit of this beneficent "retreat."

The administration of Mr. Lincoln, as it had a right to do, has proposed certain great measures of policy to meet and subdue the Rebellion: That of Emancipation; that of Confiscation; and that of the arrest and imprisonment of citizens, without the sanction, and in violation of existing laws, are the most prominent. These measures have been widely discussed by the people of the loyal States, and the recent elections show, conclusively, that they are not approved. If this were the only objection to their further enforcement, the evil might be endured; but they have caused the people of the North to be seriously divided in opinions on the subject of the war, and have thus impaired the power of the loyal States to contend with the rebellion. They have weakened, if not paralyzed, the public faith in the integrity of the Union. They have shown that it is possible, even with a million of men in the field in defence of the Constitution, that that great compact may, nevertheless, be over-ridden or disregarded, by its own chosen guardians. They have shown that the people themselves

can alone be intrusted to originate and enforce public measures. They have shown the wisdom and far-seeing sagacity of the framers of the Government, who habitually distrusted, and sought by every means to limit, the exercise of power by the Federal Government.

With these evidences of the errors of the administration, and of popular disapproval, is the President endowed with sufficient firmness and patriotism to retrace his steps, and put us back to where he found us, a free people, ever ready to vindicate the laws of the Union, whether violated by friend or foe? Ours is a Government of laws, so constituted, when properly administered, as to be incapable of overthrow. It rests upon the will of the people. Its foundations are as broad as its territory. Infidelity to such a system is rebellion against humanity itself. Its authors, aiders, and abettors are outlaws. The magnitude of the crime should make us careful, however, to distinguish and mark the parties who are really guilty—the rebel who plots and combines, and the rebel who executes. The Abolitionists, for more than twenty-five years, have been sowing the seeds of disloyalty to the Government of the Union. They have polluted and demoralized the national faith. They have made rebellion the very law of our being. They have destroyed the oneness of our people, by arraying section against section, morals against morals, religion against religion. Not satisfied with these results, they now seek the utter overthrow of the Constitution, and the consequent destruction of all the great interests of society. They constitute a miserable minority, with power only for mischief. In success or defeat, they stand in the way of all rational measures, and blight every honest hope of future peace and union. With these forces on the side of the North, and open rebellion in the South, the chances of a harmonious adjustment of political differences seem small indeed. There is, however, just one remedy left to the people of the North—and but one—and that is, to regard and treat Abolitionism as the first and greatest offender, and Secessionism as its natural ally. The destruction of the former will take away the energies and power of the latter.

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